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THE YOUTH CORRECTION AUTHORITY ACT

PROGRESS OR MENACE?

By JEROME HALL

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THE Youth Correction Authority Act¹ purports to replace punishment by rehabilitation, to substitute "scientific knowledge" for traditional and "logically unsound" methods, and most important, to contribute effectively to solution of the serious problem of criminal youth. If this proposed law can materially diminish criminality in American youth, it is progress of the first magnitude. For who has not been filled with deep concern at the spectacle of wayward youth, unconscious of its great potentialities? Who has not sometime been caught by remorse at the sight of disconsolate parents and broken homes? When it is considered, moreover, that these almost countless boys who violate the criminal laws are in large measure the products of ill-fortune, of neglect and malnutrition, it is certain that all thoughtful persons would gladly further any effort to provide humane treatment of these children in the institutions that incarcerate them. None would hesitate at the cost, from training them, fitting them for useful vocational service, for fruitful membership in the community of law-abiding citizens.

Act Is Sound in Purpose

Let it, therefore, be clear from the outset that the avowed purpose of the Youth Correction Authority Act is highly desirable; as to that there can be no dispute. By like token, however, the desirability of the avowed ends do not have the remotest connection with the basic question that legislators must decide, namely, does this particular proposed Act provide the best means of attaining these ends? Because of the dramatization of the plight of Wayward Youth and the emphasis given this in the Introduction to the Act, one must be careful lest sentiment and devotion to the objective cloud his careful appraisal of the means and methods provided by this Act. For, unfortunately, the beneficent ends so wholeheartedly desired, are not to be had for the mere asking, nor for the wishing or wishful thinking, nor by agitation which confuses ends with means. Quite apart from the rigorous limitations on what can be done by any legal system or procedure is the inescapable fact that actual reform depends on knowledge; and knowledge in this field is difficult and elusive. It depends on appreciation that much more is involved even than criminal youth. There is the community; there are the basic safeguards embodied in our constitutions and in the legal system, that now protect each individual from

oppression—especially by officials clothed with the overwhelming powers of the State. A new law enunciates a new social policy that has many ramifications; if it is wise, it builds on awareness of the total significance of the proposal.

Act Is Ill-Conceived

It is the considered conclusion of this writer that the proposed Youth Correction Authority Act is ill-conceived, that it is based on erroneous opinions of penology, that it menaces democratic American legal institutions, especially the judiciary and the legal safeguards of the individual, and that the ends sought can be achieved in other ways that do not endanger basic values cherished in this country. Let us briefly consider the principal reasons in support of this view.

What are the chief provisions of the Youth Correction Authority Act? The Act provides for the appointment by the governor of a board of three persons, rather ominously designated the "Authority". It provides that in all cases where persons under 21 have been convicted of a crime, if the statutory penalty for the offense is death, death or life imprisonment, or life imprisonment, the judge sentences, as at present. So, too, at the opposite extreme, if the penalty is not more than 30 days or a fine, the judge sentences, except in the case of a previous record, in which event the judge may commit to the Authority. If the penalty is death or imprisonment less than life, or life or a lesser period, or death or life or lesser period, or if it is more than 30 days or a fine, the judge may commit to the Authority. If the penalty is imprisonment for a period less than life, the judge cannot sentence or place on probation but *must* commit to the Authority. After ordering commitment, the court loses power to suspend its execution.

The Authority is given power "to make and enforce all rules appropriate to the proper accomplishment of its functions," but it is not given control "over existing facilities, institutions or agencies" nor are these required "to serve the Authority inconsistently with their functions." The Authority is to examine committed persons periodically and to establish agencies and employ persons to that end. It is empowered to retain custody of all persons committed to it "*so long as in its judgment such control is necessary* for the protection of the public²." The Authority is given extensive powers to release any person under supervision and upon its own conditions, to reconfine released persons, and to

1. American Law Institute, Official Draft, June 22, 1940.

2. Official Draft, section 29. Writer's italics.

revoke and modify its discharge orders. There are various subordinate provisions concerning the organization, functions and powers of the Authority.

Punishment and Rehabilitation

Several central problems result. First is the avowed aim of the Act "to substitute for retributive punishment methods of training and treatment directed toward correction and rehabilitation." What is one to say to this declaration? Are we simply to guess at the draftsman's understanding of these terms—that are nowhere defined in the Act? Are we to assume that the Act is designed actually to effect this purpose? May it not be, on the contrary, that lurking behind the above euphemistic terms and avowals, are dangers and evils far greater than any now existing? Punishment is one of the oldest words in any language; it was debated among the Greeks; it occurs frequently in the Bible and in all religious literature; the medieval scholastics weighed its meanings; it is inseparable from the eternal problem of good and evil. Obviously this is not the place for discussion of the meaning of so extensive a term; we must merely note that punishment has always designated the unpleasant, the evil consequence of wrongdoing. We may accept the pragmatic test that punishment is the deliberate infliction of unpleasant consequences by state officials after conviction for crime. Now in any particular instances, who is to judge whether the "treatment" imposed by the Authority is punishment or not? The best test would presumably be that of the offenders themselves, yet there is no evidence that their views have been consulted or considered. But one may draw upon experience, reading, informed imagination and introspection. The Act provides for incarceration in most generous allotments. Where is the normal human being who does not regard confinement in an institution, enforced absence from social intercourse, from family, friends and the day-to-day normal routine, as anything but evil and undesirable? Even children in juvenile detention homes of the most enlightened supervision frequently escape and make constant efforts to escape; they write plaintive letters to parents and others to effect their release. The human spirit cries out for freedom, for normal intercourse with its fellows, and those who have violated the laws are fortunately no different in this regard. But the Act goes farther than present laws and traditional standards of punishment. By substituting the standard of reformation for that of justice, it prolongs incarceration far beyond any limits fixed by present laws. A petty offender may be imprisoned for years if the Authority does not know he has reformed or if any other reasons deter it from acknowledging that he has reformed. Indeed, and worst of all, it may in such circumstances, subject only to a vague, ill-conceived appeal to a court, incarcerate a petty wrongdoer to the very end of his natural life if, in its special wisdom, it believes this necessary for the protection of the public. One would need to revert to

long forgotten barbarism to find a law equalling the potential brutality of Section 13, (2) (i), which provides for the commitment of youths convicted of crimes *punishable by fine or imprisonment for less than 30 days* if the youth has previously been convicted of any "violation of law", which provision, combined with Section 29 would permit the incarceration of such youths for the balance of their lives if the "treatment experts" decided they had not reformed. What happens then to the avowed aim of abolishing "retributive punishment"? In any case of enforced incarceration in a penal institution, is it not the sheerest pretense to assert that no punishment is imposed? In all cases where the term of imprisonment extends beyond customary periods, will it not be regarded as severe punishment? And in cases of extremely long incarcerations for relatively minor offenses, which must indubitably be expected in substantial numbers, such punishment will be cruel and unusual, if these terms have any contemporary significance whatever.

Punishment as a Therapeutic

There is the theoretical possibility, to be sure, that in some remote time, the bitter brew of compulsory incarceration will be sweetened by treatment so humane as to relegate certain present methods to a dark age of barbarism. Is such a vision presently feasible? And, if so, would it abolish punishment completely? We may pass over economic problems as to cost and availability of competent staffs. We may minimize the revolt of economically submerged classes of persons who see criminal offenders supplied with better food, shelter and vocational training than their industry and obedience to the laws can provide for them and their children. We may ignore the fact that the proposed Act prescribes that there shall be no interference with existing penal institutions, that these shall not be required "to serve the Authority inconsistently with their functions"—which suggests that the State is to maintain side by side, opposing institutions, that its right hand shall deliberately be undoing what is being done by its left. There remains the inescapable fact of compulsion, of involuntary incarceration and imposed training. So long as human beings cherish the right of autonomy, so long as the human spirit treasures freedom, any such scheme, even in its most promising aspect imaginable, is illusory and degrading. It offers no more than benevolent dictatorship.

There is the further difficulty, moreover, that the above rigorous dichotomy of rehabilitation versus punishment reflects a basic penological error. The assumption is that punishment serves no useful purpose, that it is barbaric, a vestige of the old lust for vengeance. We need to note that the comments on and annotations to the Youth Correction Authority Act do not establish the failure of punishment to function as a substantial deterrent. In addition, the Act indulges in the unfounded assumption that punishment has no place in

rehabilitation. But it is a matter of common knowledge that punishment, soundly conceived and temperately applied, is a therapeutic agency of first importance. The best of our prison administrators, who ought to know if anyone does, hold to this view. Cruelty must be eschewed; it is prohibited by our constitutions without exception. But to confuse punishment with cruelty and to pretend that such an Act as this abolishes punishment can only weaken existing resources conducive to maintenance and building of morale.

Limiting the Court's Discretion

The second major issue concerns the redistribution of power—specifically, the curtailment of the judges' power to sentence or place on probation and the grant of this without limit to the Authority appointed by the governor. As to the number of cases involved, we have only to note that except for the two far and narrow extremes in criminal behavior, the judge *must* commit to the Authority. If the penalty is for any period less than imprisonment for life (but more than 30 days) the judge must commit to the Authority. Even a cursory glance at the statutes of any state reveals that this range of sentences includes most of the major crimes. It includes the vast majority of crimes against property, all except the most serious crimes against the person, and an enormous array of other types of offense. Much more important, criminal statistics demonstrate that, omitting the pettiest misdemeanors, the vast majority of offenders come within the above areas in which the Court may not sentence, where it is mandatory to commit to the Authority. The practical effects of the resulting radical curtailment in judicial functions and of the grant of such enormous powers to an appointed board should be evident. The proposed Act strikes at the heart of existing penal legislation. It removes the present maximum limits set by statute and makes this a matter for the discretion of the Authority.

Let us consider these matters briefly. First as to the judicial office and function. Is there any doubt that in the vast majority of criminal cases (excepting the pettiest misdemeanors) the judge will be reduced to the status of a clerk to enter pleas of guilty, or in the minority of contested cases, to that of an umpire of the legal contest? The hypothesis is that judges lack the wisdom to fix the limits of a sentence within the bounds set by statute; that there is a type of knowledge available to the Authority that judges do not have and cannot acquire, that this lack of knowledge is so great as to render it unwise to permit the judge to fix even the initial sentence. For, it must be remembered, evaluation of the Youth Correction Authority Act must be made in light of existing parole practices; it will not do simply to argue against a non-existing rigid system of once-fixed-permanently-unchangeable judicial sentences imposed on the basis of cursory acquaintance with the accused in the court-room. We know that, in fact, the judges' sentences are not final; they are modified

by parole boards in light of all available data and study of each individual. The judge's sentence is simply the initial judgment as to deserts and potentiality for reformation.

Admittedly, judicial functions are not presently discharged as well as they might be; the manner of selecting judges, keeping them informed, specializing their work, making available all relevant data—these need implementation. But we know, also, that there are innumerable judges who have grown wise and experienced in the trial of criminal cases. They are to be shorn of their powers. We know that most judges by virtue of their training and their work, have an appreciation of the social values involved. We know that the imposition of sentences by judges is a traditional function, for the most part conscientiously exercised, that it is an integral characteristic of the judicial office and a valuable symbol of law enforcement. It is to be handed over to an Authority appointed by a governor. It need not include any lawyer. It need include only those in the favor of the governor, without intervention or participation by any recognized association of competent professional persons. The possibility of corruption and fraud may not be so serious as that of incompetence and imposition, though in many states, control of the penal institutions by the governor is hardly an insignificant affair. The answer may not be that there is incompetence now. Rather the question is how can we secure the greatest competence available for such work. We know what we have in the judiciary—both as actual, and as potential candidates for, enlightened administrators of the criminal law especially if greater facilities for securing information are made available to them. But even more, we know that now we have the protection of the statutory law, we know that beyond the stipulated limits, no judge or Authority, no matter how venal or stupid, may go in deprivation of even a convict's liberty. All this is to be swept aside by the suggested "modern methods." The opinion of the Authority that a prisoner has "reformed" and can be released "without danger to the public" is to be substituted for the legal safeguards.

Control by Courts Inadequate

It will be noted that the proposed Act makes provision for judicial sanction of the Authority's decision to retain custody of prisoners; but the provision is inconsistent with the Act as a whole, and it is insufficient in any event. Anyone cognizant with the literature advocating Treatment Tribunals will recognize their identity with the proposed Authority. He will be familiar with the thesis that judges are ill-equipped by training to impose sentences, that this requires expert knowledge. He will see the affinity in other regards of the positivistic philosophy of penal law. If there is any case whatever for a treatment Authority it must rest on its possession of expert knowledge and on the judge's lack of such knowledge to the point of unfitting him for determining

even initial sentences modifiable later by parole boards. The consequent inconsistency, if not insincerity, of calling upon this self-same individual, the judge, to approve the Authority's order for further incarceration because "the discharge of the person would be dangerous to the public because of his mental or physical deficiency, disorder, or abnormality, or because of his lack of improvement under corrective training and treatment³" is plainly evident. If the judge with the aid of a jury or a group of experts is incompetent to impose an initial modifiable sentence within bounds set by statute, how can he alone or with such help, give a competent judgment on the vital issue of further incarceration? If he has the ability to form an intelligent judgment of the psychiatric, social and other data presented by the Authority seeking to exercise its broadest grant of power, then why can he not impose the initial sentence which has far less effect on the liberty of convicted persons? But assuming that a plausible explanation can be given of such appeal to the courts, the remedy is still utterly inadequate to protect existing rights. For in the American tradition protection must be against possible abuse by any official, boards and courts alike. Such protection may be assured if prescribed in the laws that limit the conduct of all officials. What safeguard is provided by the unchecked discretion of any person on the boundless issue, the most intricate of all problems—whether a particular human being is "a public danger," or whether there is a "lack of improvement under corrective training and treatment"? If we indulge in the heartless fantasy that we and ours shall always be in the seats of power, never to be caught in the toils of such a relentless apparatus of justice, we may shut our eyes to the eradication of all definite known controls of official conduct. In the alternative, and on any view of the significance of the relevant political history, we insist that judge as well as Authority be limited by law⁴.

The Rights of the Individual

Where has the like of such a law been enacted? In the totalitarian countries, we have seen tyrants pounce first of all upon the machinery of the criminal law and smash all semblance of the individual's protection against his rulers. Surely no one deliberately seeks to further such despotism, but is the elimination of prescribed maximum sentences compensated by mere assurance of good-will? The insight of the common lawyer on such vital issues reflects the informed knowledge of western civilization. In the choice of alternatives, he knows the value of legal control of official conduct, most especially when the personal rights of weak individuals are at stake. Even if it be conceded, as we freely do concede, that most judges and authorities may be conscientious, intelligent and best-intentioned,

this does not diminish in slightest measure, the gravity of the issues or the need for control by law. The assertion is made that an analogy exists in recent legislation providing for the incarceration of psychopathic sex offenders until "they have fully and permanently recovered from such psychopathy⁵"; and also in the juvenile court laws. As to the latter, the maximum periods of confinement are prescribed by statute. As to the former, it is surprising to learn that the avowed proponents of reformation, the uncompromising critics of punishment, place their uncritical approval upon such legislation. Even if such indefinite incarceration of a handful of sex offenders is justifiable, does that provide even a remote analogy for like treatment of the vast majority of offenders? Every relevant scientific contribution as well as every humane impulse indicates that these offenders are normal human beings who do not differ essentially from the vast majority of their fellow citizens. Much is made of the success of the English Borstal reformatories, but it is noteworthy that we are given no citation of any English statute which removes all legal limits and empowers a board to decide that offenders are permanently incorrigible and to confine them permanently, regardless of the gravity of the crime committed, or whether the offender is an habitual criminal or is mentally diseased.

Does Science Afford the Answer?

This brings us to the final major issue that has been suggested above, but which needs explicit recognition. In a basic sense, it is the crucial question that underlies the entire proposal. It may be stated broadly as the claims of science against those of justice. For the best possible claim that can be made for the Youth Correction Authority Act is that of rehabilitation to be effected by scientific methods. But there are two basic reasons for rejecting such claims. Even if penology were an established science, it would still be desirable to check its application. No one is more scientific in the elimination of those he regards as offenders than the modern tyrant. But the methods of the laboratory are so remote from those used in American penal institutions as to make their designation as "science" purely honorific. Science suggests complete liquidation of offenders, of the weak and the deformed; but we do not apply such ruthless dictates. Science suggests all sorts of experimentation, but even the most hardened of prison officials does not regard the human beings in his charge as mere chemicals in a test-tube. We know that when an habitual petty offender is released from the penitentiary, there is no small likelihood that he will revert to his former criminality. Shall we therefore scientifically terminate his anti-social existence permanently, or shall we banish him from the community for the rest of his days? Hitherto we have recognized the danger to the group

3. Official Draft, section 34, 2. Writer's italics.

4. The writer has discussed this in detail in *Nulla Poena Sine*

Lege (1937) 47 Yale Law Journal 165.

5. Official Draft, xii.

but we have preferred to accept it rather than adopt the cruel alternative of science. We have preferred to believe that if our prison administration has been wise and humane, the spark of remorse, of realization of his prior anti-social conduct, of reformation, may have been kindled; we have taken our chances accordingly. Thus generally we invoke the ethical principles of our civilization as embodied in established legal principles to limit the unmitigated application of science to human relations.

But, secondly, as a matter of informed judgment, penology is far from being an established science. Hence the proposed limitations on the judiciary on the ground that judges do not or cannot understand this "science" are no less presumptuous than the suggestion that the Authority would consist of experts endowed with knowledge of a particularly difficult discipline. If penology is a science, what are its principles, what are the theories and hypotheses that are hidden from the view of interested, intelligent and experienced persons? What are the difficulties that cannot be grasped by a competent person of sound legal training in daily contact with many offenders? What are the intricacies that evade intelligent prison administrators and parole boards? Assuredly, there is knowledge of reformation of offenders, that all do not have. It is the outgrowth of thought and observation, experience with offenders, kindly interest in human beings. Undoubtedly it is a fair guess that many judges are penologists by any criteria that will bear analysis; no reason appears why most of them cannot be informed in this regard—at least to the extent of deciding the initial limits of a sentence. What does the proposed law offer in this regard that is not now and cannot be further supplied by intelligent prison administrators in contact with prisoners and acting in conjunction with competent parole boards that supplement the judges' initial insight? But the major consideration is that the limits on all available penological knowledge are enormous. The implication that any Authority can be appointed that will possess scientific knowledge enabling it to reform any particular offenders or that the Authority will have scientific knowledge that any particular offender is incorrigible and must be permanently imprisoned to protect the public simply cannot be established. Yet such are the extravagant claims of the proposed Act. It is especially difficult for specialists to confess that their knowledge is rigorously limited, that it consists mostly in insights gleaned through experience that cannot be transmitted by exposition. Yet recognition of the severe limitations on penological knowledge is of paramount importance in any self-governing community. We must realize fully that no man or group of men can plumb the human spirit, learn the precise nature of its weaknesses, or most of all, know whether or not rehabilitation has been effected. In light of available knowledge, no man or group of men may dare to pronounce any human being as utterly incorrigible, as

condemned to life-long incarceration on the guess that he never can be other than a public danger.

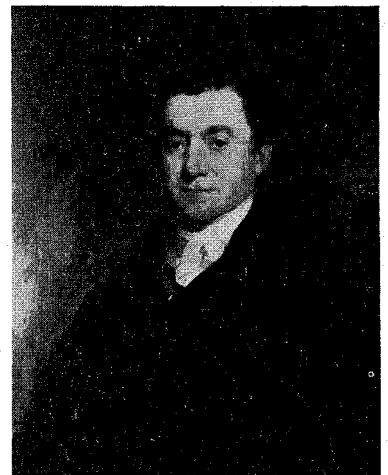
Improvements Already Available

If there is any progress in the proposed Act it surely is not to be found in the elimination of safeguards against abuse provided in existing penal statutes, nor in the radical curtailment of judicial functions and concomitant corresponding increase in the powers of an Authority. If there is progress here it can only be in improved methods of administering penal institutions, in improved treatment of offenders. But it is admitted that many prison administrators are competent penologists, that they use modern methods, that they concentrate on rehabilitation⁶. These modern, progressive methods can be further advanced within the limits of existing minima-maxima sentences. There is nothing in the present extent of judicial power based on such indeterminate sentence that bars vast improvement in the administration of penal institutions, or in the exercise of the judicial office itself. There is nothing in existing provisions for parole that prevents the appointment of competent penologists on parole boards. It is against such a background of the best existing practices that the proponents of this law must justify radical curtailment of judicial functions, elimination of legal safeguards against official abuse of basic rights, and concentration of great power in an Authority.

6. Official Draft, xi.

Supreme Court Receives New Portrait

A PORTRAIT of Justice Henry Baldwin, painted by Thomas Sully, was presented to the Supreme Court of the United States on February 16 by the Trustees of the Bar of the District of Columbia. The presentation was made by the Honorable Charles Fahy, Solicitor General of the United States, who delivered a glowing tribute to the former Associate Justice of the Supreme Court of the United States, who served for fourteen years in this capacity. Chief Justice Harlan Fiske Stone accepted the portrait expressing for the Court its appreciation for "this very real support to the maintenance of the traditions of the great institution which we all serve and cherish."



The Trustees of the Bar of the District of Columbia, representing not only the Bar Association of the District of Columbia, but the Federal Bar, the Women's Bar, the Patent Bar and some local practitioners who are not members of any bar association, presented to the Supreme Court of the United States a bust of Mr. Justice Oliver Wendell Holmes by Konenkov about two years ago. Both gifts were purchased from a surplus fund which remained after the entertainment of the American Bar Association in 1932 by the various associations which the Trustees represent.